No. 11821

United States
Circuit Court of Appeals
for the Ninth Circuit

DAWSON COUNTY, MONTANA,

Appellant,

vs.

MARY HAGAN, E. B. CLARK and MINNIE R. EVANS, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana, and UNITED STATES OF AMERICA,

Appellees,

and

MARY HAGAN, E. B. CLARK and MINNIE R. EVANS, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE and RUBY YALE, his wife, and RUTH PETTERSON and HANS PETTERSON, her husband, THE SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED, UNITED STATES OF AMERICA, DAWSON COUNTY and PRAIRIE COUNTY,

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Appellant's Brief

Upon Appeals from the District Court of the United States for the District of Montana

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STATEMENT OF THE CASE

In March, 1940 the Farm Security Administration began proceedings with the Boards of County Commissioners of Dawson and Prairie Counties looking to the purchase of the tax deed lands owned by the respective counties, and on September 5, 1940 Dawson County sold its lands, 4164.69 acres, for the gross sum of Twenty-three Thousand Five Hundred Twenty-six and No/100 Dollars ($23,526.00). Under this sale option the United States went into possession of the lands described and removed fencing, buildings and other obstructions in order to develop the lands under the joint plan of the Bureau of Reclamation and the Farm Security Administration, under the newly organized Buffalo Rapids Irrigation District within which all of said lands were to be included. The public corporation hereinabove named was organized on March 19, 1938, including 17,000 acres of land to be developed by new canals and laterals, under the Bureau of Reclamation and the presidential letter of June 16, 1937 in which the plan of construction was outlined. At the time of the creation of this corporation all of the lands involved in the Upper Glendive-Fallon Irrigation District were eliminated on account of the lack of title by the counties, the tax deed proceedings not having been completed.

The Declaration of Taking filed in this action on April 27, 1942 vested title in 5788.21 acres of land, for-

merly a part of Dawson and Prairie Counties, Montana, in the United States of America under Section 258a, Title 40, U. S. C. A. The compensation deposited in the registry of the Court amounted to $34,489.00, with valuations on the tracts described therein as follows:

Dawson County, Montana	4164.69 acres	$23,526.00
Prairie County, Montana	1309.60 acres	7,680.00
Robert Henderson estate	158.60 acres	2,100.00
Edna Yale	103.55 acres	758.00
Scottish-American Mortgage Co.	51.77 acres	425.00

The Declaration was made by the Secretary of Agriculture and was recorded in the two counties, as well as being filed in this Court, with maps of all of the separate tracts therein described attached thereto. With the exception of the Robert Henderson estate lands, the Edna Yale tract and the Scottish-American Mortgage Co. tract, the lands were all a part of the Upper Glendive-Fallon Irrigation District, created as a public corporation of Montana on December 20, 1920 and never legally dissolved, although not functioning as such under the laws of Montana since 1927. Commissioners were appointed by the District Court and qualified as such and thereafter levied assessments for the maintenance and operation of the District by resolution passed in conformity with Chapter 148, Laws of Montana

1921, fixing the irrigable area in each forty-acre tract in said District and levying assessments on such tracts as by law provided. No other or further resolution was ever passed by the Board of Commissioners changing the irrigable area of the lands in the District, and the same became fixed, under the provisions of Chapter 157, Laws of Montana, 1923, page 477. After these assessments were levied for operation and maintenance a bond issue was authorized and approved by the District Court on December 2, 1922 and in the order confirming the bond issue, provision was made for the levy of assessments for the payment of interest and principal of the bonds. Of the issue of $150,000 authorized there were sold to the public $81,500, the principal of which is still outstanding and unpaid, as well as accrued interest since January 1, 1928. The funds were to be used in purchasing a pumping plant, a coal mine, and for the construction of canals and laterals to irrigate the lands in said District under two lifts, a forty-foot lift and a seventy-five foot lift, neither of which lifts ever successfully functioned.

Assessments were made by resolution by the Board of Commissioners for the years 1922, 1923 and 1924. Thereafter the County Clerk of Dawson County, on advice from the State Board of Equalization of Montana, entered in each year the same assessment in amount as previously made by the Board of Commissioners. This was done for the years 1925, 1926 and 1927. The Public Service

Commission of Montana took over the levying of assessments in 1933, in accord with the 1921 Montana Code provisions. The law in force and effect prior to such levy so made by the Public Service Commission of Montana was amended in 1931 by Chapter 89, and on pages 167 and 168 thereof authorized the Board of County Commissioners of the county in which the district is situated to levy assessments, if the Board of Commissioners failed to do so, with this proviso:

> "Provided, however, that this Act shall apply only to irrigation districts having a bonded indebtedness and actually in operation of a dependable water supply system and furnishing substantial amounts of water to bona fide users."

The Upper Glendive-Fallon Irrigation District did not possess any facilities for furnishing water to the landowners in the District for their irrigable lands at any time or at all. Assessments were made from 1931 to 1938, inclusive, at the same rates by the Public Service Commission, notwithstanding the above Code provisions, and it appears, therefore, that none of the assessments and levies so made are valid, but all of the assessments so levied were included by the Counties of Dawson and Prairie in taking tax title by tax deed procedure for all of the lands involved in this action. Such deeds were taken in 1931 and 1939. No irrigation taxes were levied after the execution of the tax deeds to Dawson County, Montana.

SPECIFICATION OF ERRORS RELIED UPON

Appellant intends to rely on this appeal on the contentions that the District Court of the United States for the District of Montana, being the trial court below, erred:

1. In adopting the so-called "Equity Rule" in making distribution to the bondholders of the Upper Glendive-Fallon Irrigation District, for the reason that the said bondholders had no lien on the lands involved herein, title to the same having passed to Appellant by tax deeds, which under Montana law created a new title in Appellant, free and clear of all liens and encumbrances against the land. (Paragraph 2, Lines 16 to 24, inclusive, Page 3, Decision of the Court, filed September 4, 1947).

2. In finding an overpayment to Appellant (Page 8, Paragraph 1 of Page 9, Lines 1 to 4, inclusive, Decision of the Court, filed September 4, 1947), the same being in conflict with that part of the Court's decision set forth on Page 6, Paragraph 3, Lines 11 to 24, inclusive.

3. Distribution of the funds in the registry of the Court, as ordered in Paragraph 1, Page 9, Lines 5 to 16, inclusive, Decision of the Court filed September 4, 1947, is improper, being in fact a collateral attack on the tax title of Appellant to the lands, contrary to all of the provisions of Montana law relating to tax deed titles.

Exceptions to all of the foregoing were allowed counsel by the Court in its decision of September 4, 1947.

ARGUMENT

It will be noted that ~~prior to the enactment of this section,~~ the Supreme Court of the State of Montana, in its decisions held that:

> "General taxes are a prior lien to irrigation taxes, and hence under these decisions, the county acquired a new and paramount title to all of these lands," (Malott Case 94 Mont. 394)

and it was held by our Supreme Court, in the case of Jensen Livestock Co. v. Custer County, et al., 113 Mont. 285 (124 Pac. (2d) 1013):

> "But a tax deed is not derivative, but creates a new title in the nature of an independent grant from the sovereignty, extinguishing all former titles and liens not expressly exempted from its operation. (State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638; State ex rel. Malott v. Board of County Commissioners, 89 Mont. 37, 296 Pac. 1; Rosebud Land & Improvement Co. v. Carterville Irrigation District, 102 Mont. 465, 58 Pac. (2d) 765.) It is not derived from the fee, but is antagonistic to it and there is no privity between the holder of one and the holder of the other. (Horsky v. McKennan, 53 Mont. 50, 162 Pac. 376.)"

This rule is followed generally throughout most of the states, and in 51 American Jurisprudence, Section 1078, Page 937, the rule is stated as follows:

> "As a general rule, in jurisdictions where the tax is a charge on the land alone, where no resort in any event is contemplated against the owner or his personal estate, and where the proceeding is strictly in rem, the title conveyed by the tax deed pursuant to a valid sale of land for non-payment of taxes is not merely the title of the person who was assessed for the taxes and neglected to pay them, but is a new, complete, and paramount title to the land in fee simple absolute, created by an independent grant from the sovereign, which extinguishes all prior titles, rights, interests, and encumbrances of private persons and all equities arising therefrom, not expressly exempted from its operation, although owned or held by persons not liable for the tax or who were not in default for not paying it."

The bond holders had the right to protect the statutory lien of their bonds by paying the general taxes assessed for state, county and school district purposes; failing to do so, their lien is extinguished by taking of a tax deed by Dawson County, Montana a body politic and corporate,

> "Antoinette Hartman, Plaintiff v. Della Mimmach, etal., Defendants, City of Bozeman, Defendant, (154 Pac. (2d) 279)."

wherein the lien of special improvement taxes was extinguished by the execution of the tax deed, as provided in Chapter 63 of the Laws of 1937, hereinabove cited.

Under date of April 27, 1942, in this action, a declaration of taking was filed in the office of the Clerk of the above entitled Court executed by Grover B. Hill, Assistant Secretary of Agriculture; the declaration vested

the fee simple title to all of the said lands in the plaintiff, the United States of America. (Section 258a of Title 40, U. S. Code)

We contend there is no trust involved, in so far as the title of Dawson County, Montana, is concerned, to these lands for the reason that Dawson County, Montana, a body politic and corporate, did not sell the lands under the laws of Montana, and they were taken under the superior rights of the sovereign power, the plaintiff herein, for uses authorized by the laws of the Congress of the United States of America.

By reason of the foregoing, the bond holders have no right to the funds; the said funds were not derived from the sale of the lands but paid into the Registry of the Court in conformity with the Board of Commissioners, who fixed the value of the land taken by the United States for the purposes set forth in its FINAL JUDGMENT IN CONDEMNATION entered herein.

We contend that under the provisions of Chapter 100 of the Laws of the State of Montana, 1943, which is a Statute of Limitations, the bond holders are barred from any action contesting the validity of the tax deeds taken by Dawson County, Montana, to the lands involved herein and that by reason of their failure to act within the time prescribed by said Chapter 100, they are now barred from any claim to the proceeds in the Registry of the Court, representing compensation provided by law for the taking

and acquiring of the lands described in plaintiff's complaint, and taken under the declaration filed therein on April 27, 1942. The section reads as follows:

> Section 1. "A tax deed duly recorded shall, after two (2) years from the date of (a) recording and (b) also taking possession by the grantee, or his successor in interest, of the land conveyed, be treated and regarded as conclusive evidence of the regularity of the proceedings resulting in the issuance of such tax deed, from the assessment to the execution of such deed, both inclusive, and no action can be maintained to annul or to set aside such tax deed, or assert a title hostile thereto other than that the deed is void because no taxes were delinquent on said lands, or because redemption had been made from such tax sale, unless the action is commenced within two (2) years from and after the recording of such tax deed, and the taking of possession by the grantee, or his successor in interest, no action can be maintained to set aside or annul the same or to assert a title hostile thereto, other than that the deed is void because no taxes were delinquent on said lands, or because redemption had been made from the tax sale, unless the action is commenced within two (2) years from and after the passage of this act."
>
> "The time herein fixed shall, if the acts of (a) recording and (b) taking possession by the grantee are on different dates run from the event last occurring, provided that both acts shall be essential to start the running of this statute of limitations."
>
> Section 2. "All acts and parts of acts in conflict herewith are hereby repealed."
>
> Approved February 26, 1943.

The Declaration of Taking filed in this action by the Secretary of Agriculture used the same acreage of lands owned by Dawson County and fixed the value at the same

price as fixed by the option, Trpp 43, and recognized Dawson County as the owner of said lands. Thereafter, for their convenience, the Secretary of Agriculture or some agency of the United States, divided the 4164.69 acres into fourteen tracts, designated by the numbers 494-1 to 491-14, inclusive. Such a division was not a part of Dawson County's option and contract of sale, and the County contends that it is not bound by the separation of its lands sold and taken by the United States into tracts but that it has a right to rely upon the taking of the gross acreage owned by it by the United States, which became the fee owner under Federal law, taking full possession of all of said lands for its purposes set forth in the Declaration of Taking.

Dawson County claims the full compensation for this acreage as the owner thereof recognized as such by the Supreme Court of Montana and the Federal Courts.

> State ex rel Malott v. Board of County Commissioners of Cascade Co., 89 Mont. 37, 296 Pac. 1.

Quoting from page 95 of said case:

> "We are satisfied that the rule heretofore announced by this court in the Cosman Case to the effect that bonds issued by an irrigation district constitute general obligations of that district is erroneous. We are further satisfied that less injury will result from overruling rather than following the doctrine as last above announced; and therefore the former holding of this court to the effect

> that such bonds constitute general obligations is overruled. It follows that the lien of the bonds is extinguished by the tax deed to the county, and that the purchaser from the county takes title free and clear of the lien of the bonds."
> (Underscoring ours).
>
> Toole Co. Irr. Dist. v. Moody, C. C. A. 9th Dist. 125 Fed. (2d) 498.

None of the landowners of the Upper Glendive-Fallon Irrigation District paid his share of the bonds or interest thereon for the reason that there was never any irrigation.

In 18 Am. Juris. p. 738, Sec. 112, on the title and rights acquired under eminent domain, the following statements are made:

> "The appropriation of private property for a public use is generally viewed as a proceeding in rem. The power of eminent domain when exercised acts on the land itself, not on the title or sum of titles if there are diversified interests." Citing in support thereof: Re Third Street, 177 Minn. 146, 225 N. W. 86, 74 A. L. R. 561; State ex rel St. Louis v. Beck, 333 Mo. 1118, 63 S. W. (2d) 814, 92 A. L. R. 373.

Further quoting from 18 Am. Juris. p. 738:

> "All inconsistent proprietary rights are divested and not only privies but strangers are concluded. Thereafter whoever may have been the owner or whatever may have been the quality of his estate he is entitled to full compensation according to his interest and the extent of the taking, but the

> paramount right is in the public—not as claim under him by a statutory grant, but by an independent title." Citing in support thereof: Weeks v. Grace, 194 Mass. 296, 80 N. E. 220, 9 L. R. A. (N. S.) 1092; Emory v. Boston Terminal Co., 178 Mass. 772, 59 N. E. 763, 86 Am. St. Rep. 473; Gassaway v. Seattle, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68.

In the case of A. W. Duckett v. U. S., 266 U. S. 149, 69 L. ed. 216, 45 Sup. Ct. 38, the Court held eminent domain creates a new title and extinguishes all previous titles. The same ruling was made in Collector of Taxes v. Revere Bldg., 276 Mass. 576, 177 N. E. 577, 79 A. L. R. 112.

In U. S. v. 19.86 acres of land in East St. Louis, Mo., 141 Fed. (2d) 344, 151 A. L. R. 1423, it is said:

> "The government in the exercise of its right of condemnation occupies a position different from that of a voluntary purchaser, since condemnation acts upon the res." (Underscoring ours.)

The Declaration of Taking was not made until April 27, 1942. In the meantime the agencies of the United States had removed the fencing, buildings and other obstructions to its method of irrigating the land taken under said option.

Since the lands involved were not sold under Montana law providing the manner and terms of sale of tax deed lands acquired by the counties, the rule announced by the

Montana Supreme Court in the Malott Cases, 89 Mont. 37 and 94 Mont. 406, does not apply as to the application of the compensation money here involved—the total tax liability being over $60,000.00, whereas the value fixed by the Secretary of Agriculture in his Declaration of Taking was $23,526.00.

All of the irrigation assessments made after the passage of Chapter 89, Laws of Montana 1931 are void, as no compliance with said law was made or could have been made. No canals for the delivery of water were constructed and no water supplied, as required by said Chapter, to any landholders, thereby authorizing the Board of County Commissioners to levy assessments where the Board of Commissioners of the Upper Glendive-Fallon Irrigation District failed to do so. The rights of the bondholders were to pay the general taxes before delinquency or to purchase the lands at the sale for general taxes or to redeem the lands from the general taxes, failing in which the bondholders lost all of their rights. This is well illustrated by our Supreme Court in the case of State ex rel Malott v. Board of County Commissioners, 89 Mont. 37, quoting from page 93.

> "Under the provisions of section 1928, the school funds of this state may be invested 'in first mortgages on good, improved farm land in the state of Montana.' But, if a loan is made of the school funds upon farm lands, the lands are still subject to taxation, and the State of Montana is obliged to protect its loan by the payment of the taxes levied against the land, or suffer the

> loss of its security through the taking of a tax deed. The bondholders are in the same situation, and may protect their security by either paying the taxes or redeeming the land at any time prior to the expiration of the period for redemption."

Here the only question, it would seem, before the Court is whether the bondholders at the time of the filing of the declaration of taking had liens upon the property. This proposition has been settled by our Supreme Court many years ago, a distinct holding being in the case of Malott, 94 Montana 394, hence the bondholders could not have had any lien or right or title to any part of the funds. The recent ruling of the United States District Court for Nebraska in the case of United States v 12,800 acres of land in Hall County, Nebraska, appearing in Volume 69 Federal Supplement page 767, states the matter clearly. In this case the Court held at page 771 "Of course, the condemnation award now stands in lieu of the condemned land, and only those who had an estate in that land have any interest in the fund representing this award. See Oliver v. United States, 8 Cir., 156 F 2d 281; United States v. 25,936 Acres of Land, etc., 3 Cir., 153 F 2d 277. Since Tract No. 53 and Tract No. 54 are situated in the State of Nebraska, the law of that state, the lex loci rei sitae, governs in deciding questions as to the title and estates or interests in this land. DeVaughn v. Hutchinson, 165 U. S. 566, 17 S. Ct. 461, 41 L. Ed. 827. And the federal court must now be guided by local state law in determining substantive rights in the instant condemnation proceedings,

regardless of how jurisdiction is acquired, United States v. Becktold Co., 8 Cir., 129 F. 2d 473; Swanson v. United States, 9 Cir., 156 F. 2d 443; unless those rights are grounded upon the Constitution or laws of the United States, United States v. Miller, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A. L. R. 55, in which case the federal courts must fashion the governing rules according to their own standards. Cf. Lyeth v. Hoey, 305 U. S. 188, 59 S. Ct. 155, 83 L. Ed. 119, 119 A. L. R. 410; Deitrick, Receiver, v. Greaney, 309 U. S. 190, 60 S. Ct. 480, 84 L. Ed. 694.

It does not appear that Section 258a Title 40 U. S. C. A. or F. C. A. is involved or need be considered in determining to whom the compensation should be distributed. It has been held by the Courts that where an agreement is entered into between a private citizen and the Government, in which the purchase price to be paid for the property by the Government has been fixed and the Government thereafter condemns the property, that the offer made and accepted is binding upon both the Government and the citizen as to the compensation to be paid for the land. The agreement entered into regardless of the action brought to condemn remains binding. See the following cases relating to contracts entered into by Government fixing compensation:

Muschany vs. U. S.
324 U. S. 49

Danforth vs. U. S.
308 U. S. 271-282

Bank of Edenton vs. U. S.
(4 cir.) 152 Fed. 2nd 251-4

Oliver vs. U. S.
(8 cir.) Fed. end, rendered April 9, 1946. Interest not allowable

U. S. vs. North Carolina
136 U. S. 211

U. S. vs. Rogers
255 U. S. 163-169

Seaboard Airline vs. U. S.
261 U. S. 299, 305

Smyth vs. U. S.
302 U. S. 329

In the agreements as a rule there was a clause which provided the Government could condemn if it elected, but this would not affect the provision as to payment of the sum fixed as purchase price. This statute was enacted to make it possible for the Government to enter into immediate possession of the property condemned, save payment of interest on purchase price, and make purchase money immediately available to the persons entitled thereto.

The offer made by Dawson County, Montana, to sell 4, 164. 69 acres of land to the Government for $23,526.00 did not divide lands into tracts. The offer made was as follows, to wit:

> "IT IS HEREBY STIPULATED AND AGREED by and between the County of Dawson, State of Montana, acting by and through the Board of County Commissioners, and the United States that for all purposes of this condemnation proceeding the price and value of Tract No. 494, containing 4,164.69 acres, more

particularly described in the petition filed herein, shall be the sum of $23,526.00 and that the award of the Court, or any appraisers or commissioners appointed by the court in this proceeding, may be $23,526.00."

FEDERAL CASES SUPPORT DAWSON COUNTY'S CLAIM TO AWARD

In U. S. v. Certain lands in Town of Hempstead, N. Y. 129 Fed. (2) 918 the court said:

"Where the Federal government acquired title to New York land in condemnation proceedings after the land had been sold to the county for taxes, but before expiration of the period of redemption and original owners did not redeem and tax deed issued to the county, the county was entitled to the entire condemnation award."

In Oliver v. U. S. (C. C. A. 8th) 156 Fed. (2) 281 the court held, that the United States cannot repudiate its contract of purchase and condemnation award follows the contract.

In Oliver v. U. S. 155 Fed. (2) 73, the court held: Contracts between the government and a landowner made in contemplation of acquisition of land by condemnation fixing the value of the land for that purpose are valid.

And further held:

Where the government agency acquiring land for the United States is authorized to acquire it by purchase contract made by it on behalf of the United States with the landowners it may validly fix the net amount to be received

by the landowner either by purchase or condemnation and in such contract the parties may bind themselves to a consideration which may be either greater or less that just compensation in the constitutional sense.

In Florida Beaches v. Niagara Inv. Co. 148 Fed (2) 963 C. C. A. 5th Cic. the holding of the court was;

Where one Florida Corporation had legal title to condemned land and the second corporation asserted an equitable lien or claim thereto, the condemnation fund was ordered paid over to the holder of the legal title without prejudice to an assertion in another court of the second corporation's claimed equitable rights; citing 40 U. S. C. A. 258 A.

(1) CONCLUSION

We conclude by pointing out Dawson County's position in this action. Under all of the decisions of the Supreme Court of Montana, the tax deeds created a new title to the lands in the County, free and clear from all prior liens and encumbrances (Tr. pp 101) Answer of Dawson County not denied by Reply (Tr. p 49 to 51 incl).

The bondholders thereafter had no lien. They failed to pay the general taxes on the lands involved and protect their lien as all mortgagees and other lien holders are required to do or lose all rights in the land. They could have purchased the tax sales certificates and acquired the title to the lands by tax deeds and thus become entitled to all of the funds.

In the decision of the court (Tr. pp 101) there is reference made to a rule citing the Malott Case (89 Mont. 37) we find on close examination of that case it is mere "dicta" as the court itself states the question is not before it but then proceeds to give an emanation of wisdom as to what the law should be, without any citation of authorities to support its statements. However it must be borne in mind that nothing was ever done to carry out the "dicta" of the court in that or any other Montana cases. We contend therefore that the action taken by the government as stated by its counsel was only the usual action to quiet title in which all parties whose names are in the records are made parties without regard to any legal claim or right recognized in law as to their former interest in the lands or present claim thereto. (Tr. pp 104-105)

(2) OVERPAYMENTS

There can be no claim of overpayments to the Counties here as they sold specific acreages to the United States for fixed considerations all agreed to by the parties and without any division into tracts agreed to by the same parties and further agreed that in any condemnation of the lands the awards would be the contract price agreed upon by them. The purpose being to enable the government to take immediate possession of the lands and develop the same according to the plans approved by the agencies of the United States who made these agreements.

In all of the transactions had between the United States

and the Counties the same fixed sum for the same fixed acreage appears so that there was no division into tracts or segregation of the sums to be paid to the Counties. In view of which facts we observe that it is horn book law that the Counties were not thereafter concerned with any division of the lands made by the agencies of the United States and they were estopped to assert any claim to other than the agreed consideration for the acreage sold as the doctrine of equitable conversion took effect immediately upon the option contract being in effect between the parties thereto.

There was no appeal from the Final Judgment as far as the Counties were concerned. They had sold so many acres for so much money and had no right thereafter to alter their contracts with the United States. There can be no overpayment as there was no division of the lands and the prices to be paid therefor between the buyer and the seller. The division of the lands into tracts was for the convenience of the government agencies and could not alter, set aside or hold for naught the contracts previously made between the parties.

(3) DISTRIBUTION OF THE FUNDS

The courts order of distribution is improper being a recognition of a right in the lands involved herein which were lost by the bondholders failure to follow the law of Montana and protect their liens as by law provided. They allowed the lands to go to tax deed and wipe out their lien.

The order of the court amounts to an attack on the

tax title of the counties where none such is permitted by the laws of Montana. The action that could have been taken by the bondholders to protect their lien was never taken. The record shows no taxes were paid by the landowners and no irrigation was ever had (tr. pp 103). We contend the bondholders occupy the same position as a mortgagee who loaned his money on lands and then fails to see that the general taxes are paid and in due course the taxing authorities take over the lands on tax deeds thereby the bondholders the same as mortgagees lose their security Here the bondholders cannot assert their lost lien after 14 years as the tax deeds have wiped out the lien.

We respectfully submit that the Order of Distribution made in the Order and Decision of the Court (TR. pp 109) is erroneous and should be reversed herein and the funds now in the Registry of the Court should be ordered paid to the Counties as the sole owners of the lands involved herein none of which were after the taking of the tax deeds by the Counties subject to any liens or encumbrances whatsoever.

Respectfully submitted:

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